Supreme Court, U. S.
FILED
OCT 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-5541

TULARE LAKE CANAL COMPANY and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10022
(212) 644-8600

Attorney for Petitioners

Of Counsel:

ALLAN BLUMSTEIN
MARVIN WEXLER
New York, New York

ALVIN J. ROCKWELL
THOMAS A. WELCH
BROBECK, PHLEGER & HARRISON
San Francisco, California

DONNELLY, CLARK, CHASE & JOHNSON
NEWELL & CHESTER
Los Angeles, California

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	9
Statement of the Case	12
Authorization of the Pine Flat Dam	13
The Repayment Contracts	14
The Cohen Opinion and Its Progeny	15
The Test Case	20
The Trial	22
Reasons for Granting the Writ	28
The court below has decided important questions of federal law which have not been but should be settled by this Court	28
A. Section 46 of the 1926 Act — the "Prepayment" Issue	28
B. Section 8 of the 1944 Act	33
Conclusion	39

TABLE OF AUTHORITIES

PAGE

Case:

Greenwood v. United States, 350 U.S. 366 (1956) 35

Statutes:

Flood Control Act of 1944, 58 Stat. 887 et seq.:

Section 8, 58 Stat. 891, 43 U.S.C. §390 .....4, *passim*

Section 10, 58 Stat. 901 .....8, *passim*

Omnibus Adjustment Act of 1926, Section 46, 44 Stat. 649, 43 U.S.C. §423(e) .....3, *passim*

United States Code Annotated, Title 43, Section 412 36

Other Material:

90 Congressional Record, p. 4123-4124 and 4209 35

Warne, William E., *The Bureau of Reclamation* (1972) 14, 15

IN THE

Supreme Court of the United States

October Term, 1976

No. .....

TULARE LAKE CANAL COMPANY and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Tulare Lake Canal Company and Tulare Lake Basin Water Storage District respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on April 5, 1976.

Salyer Land Company, a defendant-appellee below, has filed a separate petition for a writ of certiorari which adopts the arguments advanced herein and advances addi-

tional arguments why a writ of certiorari should issue herein.

In addition, 26 other entities situated similarly to petitioner Tulare Lake Canal Company, to wit, public districts and private companies which deliver to water users, through irrigation canals and works, water from the Kings River in California, have agreed to be bound by the judgment in this case.

Opinions Below

The opinion of the Court of Appeals, reported at 535 F.2d 1093, appears in a separate appendix to this petition as Exhibit A. The opinion of the Court of Appeals denying motions for rehearing and for rehearing *en banc,* also reported at 535 F.2d 1093, appears in the appendix as Exhibit B. The opinion of the United States District Court for the Eastern District of California, reported at 340 F. Supp. 1185 (1972), appears in the appendix as Exhibit C.

Jurisdiction

The judgment of the Court of Appeals was entered on April 5, 1976. Timely petitions for rehearing were denied on June 7, 1976. On August 13, 1976, Mr. Justice Rehnquist extended the time to file this petition until October 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the District Court was based on 28 U.S.C. §1345.

Questions Presented

In the case at bar, after 2½ years of deliberation which resulted in an 87-page printed opinion, the Ninth Circuit has decided fundamental questions concerning federal reclamation law,* which questions a former Secretary of the Interior in 1961 described as having "transcendent importance in the administration of the Federal reclamation laws."

The Ninth Circuit, in a case of first impression, has decided those issues in a manner which will have a profound impact on the agricultural economy of this country. It has decreed both an expansion and extension of the "160-acre" limitation so as (1) to put in jeopardy the water rights of thousands of western farmers who entered upon reclamation projects and (2) to subject farmers, who never entered upon reclamation projects, to the acreage limitation where Congress never intended it to apply.

In the 19th century Congress determined that entrymen on public lands should be limited to obtaining patents for public lands which could not exceed 160 acres.

In 1902, when another Congress enacted the first federal reclamation statute, the magic figure of 160 acres as the ultimate permissible size of a farm on public lands held

* The term "federal reclamation law" generally refers to the Act of June 17, 1902, 32 Stat. 388 and subsequent congressional enactments amendatory or supplementary thereto. Most of those provisions are to be found in Title 43 of the United States Code. For purposes of this petition, the key provision of federal reclamation law is §46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. §423(e) quoted in full at pp. 10-12, *infra.*

sway and became the basis for the acreage limitation of federal reclamation law.

> "Public lands on reclamation projects [were] made subject to entry under the homestead laws in tracts of 160 acres or less in order to preserve the public domain for actual settlers." (App., Ex. A, p. 46A).

A half century later, in the case at bar, the Ninth Circuit—in awe of the 160-acre farm as the ultimate objective of federal reclamation law—has rendered a decision which will deny to the farmers of this country the benefits to be derived by the utilization of the most advanced and efficient agricultural techniques on *privately owned* tracts of land which are far in excess of the limited acreage which had its origins in the determination of a 19th century Congress of the appropriate amount of *public* land to be made available to homesteaders. The Ninth Circuit did so although there is no clear congressional foundation for such expansion and although its action would fragmentize a successful community of farmers utilizing the technological advances of the last century to produce the most productive farmland on the continent.

The court below has determined, as a matter of statutory interpretation, that (a) as to all federal reclamation projects subject to §46 of the Omnibus Adjustment Act of 1926 (encompassing some 10 million irrigable acres) and (b) as to some 90 flood control projects built by the Army Corps of Engineers pursuant to congressional authorization contained in the Flood Control Act of 1944, any farmer receiving any irrigation benefits from such projects must sign a contract, in accordance with §46 of the 1926 Act, requiring the disposal of all of his landholdings in excess of 160 acres at a price excluding the incremental

value resulting from the existence of the project, or else be denied the irrigation benefits of such projects for any of his farmland in excess of 160 acres.

The court below reached this result in two steps: *first*, it determined that pursuant to federal reclamation law a farmer with holdings in excess of 160 acres could not relieve himself of that acreage limitation, as imposed by §46 of the 1926 Act, by prepaying his obligation to reimburse the United States for the cost of constructing the project in question, although by prepayment the farmer voluntarily gave up the subsidy available to him under federal reclamation law in the form of longer payout terms on an interest-free basis.*

The Ninth Circuit held (App., Ex. A, p. 49A):

> "Section 46 was intended [by Congress] to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale."

Second, it determined that §8 of the Flood Control Act of 1944 applied to all *flood control* projects built under the direction of the Army Corps of Engineers and authorized by the 1944 Act and that the federal reclamation law governed the access of farmers to their own water notwithstanding that the Secretary of the Interior had not built any irrigation works—the congressionally imposed condi-

* It has always been congressional policy in connection with federal reclamation projects to require the beneficiaries to repay to the Government the costs of constructing the projects. But payment of these costs has always been permitted over an extended period of time as long as 40 years and on an interest-free basis. By "prepayment" as used in this petition we mean simply that the farmer, instead of taking full advantage of the liberal, interest-free payout terms provided by federal reclamation law has at some earlier stage repaid his entire obligation.

tion precedent to the application of federal reclamation law to such projects.

The Ninth Circuit went so far as to hold that §8 of the Flood Control Act of 1944 mandates the imposition of acreage limitations upon *privately owned water* stored behind a flood control dam even though there has never been any determination by the Secretary of War that the flood control dam and reservoir may be used for irrigation purposes, as is expressly required by §8.

In such fashion, the Ninth Circuit, by ignoring the will of Congress and the realities of the agricultural economy of 20th century America has, for those areas which cannot survive within the confines imposed by the 160-acre farm limitation, ordered a counter-revolution in American agriculture.

Unless the decision of the court below is reversed, numerous large privately owned tracts of land throughout the United States, which are today farmed with the most advanced and efficient agricultural techniques available, at great savings in cost to the consumer, and even farms of moderate size, will no longer be able to exist in their present form.

Unless the decision below is reversed, the agricultural community directly involved in the case at bar—an agricultural community in the State of California of more than 1.1 million acres containing some of the most fertile and productive land in this country, will be economically devastated. There are farms in that community which are measured in miles, not in acres—and there is just no way

those fertile and productive lands will be able to continue to produce their bountiful harvest if they must be broken up into 160-acre tracts (see pp. 25-28, *infra*).

Moreover, the devastation of this agricultural community will take place, although for an extended period of time during the 1940's and 1950's, responsible officials of the Department of the Interior reassured the farmers of that community that, pursuant to established rulings and practices of that Department, prepayment of the farmers' obligations for the cost of constructing the project in question would relieve them of the acreage limitations of federal reclamation law and the farmers, to their financial detriment, relied on those assurances (see pp. 15-20, *infra*).

Before the enormous and disastrous consequences of such a result are visited on the agricultural economy of this country, this Court should order a full review of the questions presented in this case to determine for itself whether the Ninth Circuit has correctly divined the congressional intent on these subjects. And, in these circumstances it is not presumptuous, we submit, to suggest that the United States which commenced this lawsuit as a "test" case should join us in seeking such a full review by this Court.

Specifically, the questions presented are:

1. Did Congress intend, by §8 of the Flood Control Act of 1944, to apply the acreage limitation provisions of federal reclamation law to all dams authorized by that Act? Did Congress intend that all recipients of any so-called "irrigation" benefits from dams built by the Army Corps of

Engineers under the 1944 Act not be entitled to receive any such benefits for their landholdings in excess of 160 acres?

2. Does the term "irrigation purposes" as used in §8 of the 1944 Act apply to the storage of privately owned water behind a flood control dam? If so, what did Congress intend when it used the term "conservation storage" in §10 of the 1944 Act?

3. Did Congress intend, by §46 of the Omnibus Adjustment Act of 1926, that farmers receiving any irrigation benefits from a federal reclamation project must agree to divest themselves of farmland owned by them in excess of 160 acres, or else be deprived of such irrigation benefits for their "excess" farmlands, even though the farmers (through the irrigation units which deliver water to them) have prepaid their allocable share of the construction costs of the dam and have thereby voluntarily forsaken the subsidy available to them under federal reclamation law by way of longer payout terms on an interest-free basis? Did Congress intend, by §46 of the 1926 Act,

> "to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale" (App., Ex. A, p. 49A)?

4. Should a long-standing Executive interpretation of a federal statute, as well as established Executive policies and practices in furtherance of that interpretation, be overturned when private citizens, to their financial detriment, have long relied on the Executive's interpretation, policies and practices?

Statutes Involved

Section 8 of the Flood Control Act of 1944, 58 Stat. 887, 891, 43 U.S.C. §390, provides:

> "Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of the structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirements shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army Engineers, which provides conservation storage of water for irrigation purposes."

Section 10 of the Flood Control Act of 1944, 58 Stat. 887, 901 (the provision of the 1944 Act which gave specific authorization for construction of the Pine Flat Dam, the flood control project at issue in this case) provides, in pertinent part:

> "The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-sixth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated cost of $19,700,000: *Provided,* That the conditions of local cooperation specified in said document shall not apply: *Provided further,* That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further,* That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations."

Section 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, 43 U.S.C. §423(e), provides:

> "No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and

maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of Interior: and that until one-half of the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration in-

volved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided further,* That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment."

Statement of the Case

This lawsuit, commenced by the United States in 1963, is concededly a "test" case—brought for the express purpose of obtaining a *judicial* determination of two fundamental issues concerning (1) the proper construction of federal reclamation law, and (2) the proper construction of the Flood Control Act of 1944, which we have previously described. It is of great significance, we submit, that this case was started after a period of almost two decades during which various departments within the Executive branch could not agree on the proper resolution of those two issues. During these two decades, officials of various departments of the Executive branch and sometimes officials within the same department, issued opinions and decisions directly in conflict with each other with respect to those two issues. And, as we demonstrate shortly, on the "prepayment" issue in this case, this lawsuit was precipitated by an opinion of a new Solicitor of the Department of the Interior in 1961 repudiating the Department's policy on "prepayment" which had been firmly established for almost 15 years.

Authorization of the Pine Flat Dam

In the late 1930's, the federal government undertook to study the need for a dam on the Kings River in California. Over the course of several years of debate concerning this project, officials of the Roosevelt Administration repeatedly and insistently urged that Congress authorize the dam as a reclamation project whose construction and control would be within the jurisdiction of the Bureau of Reclamation, and the costs of which would be reimbursed to the Government under the provisions of federal reclamation law.

In 1944, Congress rejected the Administration's pleas. It determined that the Pine Flat Dam should be built on the Kings River; but it also determined that the dam should be constructed by the Army Corps of Engineers based on an express congressional finding that the principal purpose of that dam would be to alleviate the disastrous flooding that occurred periodically in the portion of the San Joaquin Valley in California through which the Kings River flowed.

In authorizing construction of the Pine Flat Dam, Congress, however, did concede one fact to the Administration: it recognized that the Pine Flat Dam would provide some derivative and secondary irrigation benefits to farmers in the Kings River service area by regulating the flow of water on the Kings River. In recognition of this fact, §10 of the 1944 Act, the specific authorization statute for the Pine Flat Dam, provided:

> "That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Pro-*

vided further, That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations."

The Repayment Contracts

In the years that followed, efforts to negotiate the payment arrangements called for by §10 were unsuccessful. At first, they were unsuccessful because: (a) there was a direct conflict within the Administration concerning the meaning of §8 of the 1944 Act; the Department of the Army maintained that the acreage limitations of federal reclamation law did not apply to the Pine Flat Dam;* the Bureau of Reclamation took exactly the opposite position;** and

* The Department of the Army maintained this position from the day the statute was enacted. In 1957, the Department of the Army committed its views to paper, in a 28-page analysis of the pertinent provisions of the Flood Control Act of 1944 and of the legislative history of that statute (R.A. 143-170). ("R.A." refers to pages in the record on appeal in the court below.) We may note that the Department of the Army was thoroughly conversant with all aspects of the Pine Flat Dam project. In 1940, the Department's Corps of Engineers in a report to Congress had recommended construction of the dam as a flood control project (P. Ex. 4) ("P. Ex." refers to plaintiff's exhibits in the District Court), and in §10 of the 1944 Act Congress authorized construction of the dam "substantially in accordance with the plans contained" in the Corps of Engineers' report.

** One reported anecdote illustrates the intensity of this disagreement within the Executive branch. In a book written in 1972 entitled *The Bureau of Reclamation,* William E. Warne, a former Assistant Commissioner of the Bureau, recounted that (pp. 184-185):

> "One night, after the Flood Control Act of 1944 had been signed, an assistant commissioner of reclamation met with a group of irrigators in Fresno, California, to explain to them the provisions of the reclamation law, which, he said, now would govern the sale of water from Pine Flat Dam, just authorized for construction by the Corps of Engineers. The assistant chief

(footnote continued on next page)

(b) by Presidential fiat, the Secretary of the Interior replaced the Secretary of War (the person expressly designated by Congress) as the federal agent to negotiate the repayment contracts.

In those circumstances, the farmers in the Kings River service area were not willing to negotiate a contract with the Secretary of the Interior. The Secretary had adopted the position of his Bureau of Reclamation on the issue of acreage limitations, while the farmers shared the view of the Department of the Army, that acreage limitations did not apply to the area served by the dam.

The Cohen Opinion and Its Progeny

On October 22, 1947, the then Associate Solicitor for the Department of the Interior, Felix Cohen, a distinguished lawyer and scholar, issued an opinion (relying upon prior decisions and practices) which held that the acreage limitation provisions of federal reclamation law would be lifted and become inapplicable when local water users paid to the Government, in a lump sum, that portion of the cost of any particular project allocable to irrigation benefits (D. Ex. F18).* The Department of the Interior promptly sent the

of Engineers, General Robins, walked in. He grew redder of face by the moment as the Bureau representative explained that Section 8 of the Flood Control Act—as he read it—provided that the Bureau would market the water service under the reclamation laws.

> 'You know damned good and well that isn't so,' the General burst forth.

The meeting ended abruptly in confusion. After almost three decades, the question as to which of the speakers was right has still to be settled by the federal courts."

* "D. Ex." refers to defendant's exhibits in the District Court.

Cohen opinion to the Bureau of Reclamation's Regional Directors as authority for lump-sum payout as an alternative to the execution of contracts requiring farmers to dispose of their holdings in excess of 160 acres.

For the Kings River water users, lump-sum payout in accordance with the Cohen opinion (already authorized by §10 of the 1944 Act) was a solution to their problem. Rather than continue the debate as to whether §8 of the 1944 Act imposed acreage limitations, the local water users commenced negotiations with the Department of the Interior looking toward a repayment contract which would require lump-sum prepayment of construction charges, but which would not impose any acreage limitations. By 1955, a draft contract had been prepared.

Then, at the request of Congress, the Department of the Interior undertook another review of the propriety of the lump-sum prepayment provision of this draft contract with the Kings River water users. The Department's conclusions were embodied in a two-volume report entitled "Excess Land Provisions of the Federal Reclamation Law and the Payment of Charges," dated May, 1956 (P. Ex. 84). The report exhaustively documented the history of the negotiations with the Kings River water users to that date, set forth the applicable statutes and administrative decisions, described various instances in which similar "pay-out" provisions were embodied in Government contracts with other farmers on other dams, and concluded:

> "The proposal contained in the repayment contract arrangements negotiated with the Kings River Conservation District is simply that when and to the extent

> construction charges repayable under that contract are paid to the United States, the lands with respect to which full payment is made will no longer be subject to the excess-land limitation of the federal reclamation laws. Development of this phase of the proposed contract constitutes the application of a principle which is consistent with a policy of long standing and which is compatible with the construction of Acts of Congress as they have been interpreted by administrative officials and legal staffs of the Department over a long period of years."

In the 1955 draft contract, the water users (acting through the Kings River Conservation District, a public district created for the express purpose of negotiating a repayment contract with the United States) and the Bureau of Reclamation agreed that an *individual farmer* would be relieved of acreage limitations if *he* paid *his share* of the capital cost of the project allocable to irrigation benefits. The italicized portions of the proposed contract set forth above were its downfall. When, in June, 1957, the Secretary of the Interior asked Solicitor Bennett to render an opinion on the validity of the contract, Solicitor Bennett determined that §46 of the 1926 Act prohibited contracts with *individual holders* of excess land and ruled, accordingly, that the contract was not in proper form. But Solicitor Bennett did not reject the principle of prepayment; on the contrary, he endorsed it, stating (D. Ex. P20):

> "It is the payment of the full obligation by the district under the 1926 Act joint-liability repayment contract, as well as the similar payment under the 1912 Act individual contracts, that relieves the excess land from the statutory restrictions."

The Department of the Interior subsequently reassured the Kings River water users that lump-sum prepayment by the water districts in the Kings River service area would lift the acreage limitations of federal reclamation law (*e.g.*, D. Ex. H4; D. Ex. MM; D. Ex. TT; D. Ex. U20; D. Ex. W20).

Finally, in 1960 a permanent contract which was acceptable to both the United States and the water users and which provided for prepayment, but contained no acreage limitations, was drafted. The Kings River water users approved the draft on October 17, 1960. On January 3, 1961 still another Solicitor's opinion—this one by Solicitor Stevens—corroborated that a lump-sum prepayment by the water districts would remove the acreage limitation restrictions of federal reclamation law (D. Ex. Y5).

On January 19, 1961, the outgoing Secretary of the Interior, Fred Seaton, fully endorsed the view that prepayment relieved excess landowners of acreage limitations and he approved the draft contract between the United States and the Kings River water users, but he determined that because of the "transcendent importance in the administration of the Federal reclamation laws" of the prepayment question, execution of the contracts should be deferred pending review by the incoming Attorney General, Robert Kennedy. Secretary Seaton wrote to Attorney General Kennedy as follows (D. Ex. Y5):

> "The legal officers of this Department have consistently been of the view that the restrictions of the excess land provisions do not continue beyond the date of payout of its construction charge obligation to the United States by the contracting entity. Enclosed are

the several legal opinions in which this position has been expressed. These are:

> Will R. King, Chief Counsel, approved July 22, 1914, 43 LD 339
>
> Felix S. Cohen, Associate Solicitor, October 22, 1947, M-35004
>
> Elmer F. Bennett, Solicitor, July 10, 1957, M-36457
>
> Theodore F. Stevens, Solicitor, January 3, 1961

Notwithstanding the views continuously expressed by the principal law officers of this Department, the opposite point of view has been earnestly and repeatedly pressed upon this Department. The earnestness and insistence with which these contrary views have been pressed, together with the widespread interest in the question and its transcendent importance in the administration of the Federal reclamation laws, prompt me to request your consideration of the matter in order that it may definitively be set at rest within the Executive Branch."

Attorney General Kennedy referred the proposed contract to the new Secretary of the Interior who, in turn, referred it to his new Solicitor. On December 26, 1961, the new Solicitor, Frank Barry, issued an opinion disapproving the proposed contract. The opinion, in blunt terms, was a complete reversal of the Government's position *vis-a-vis* the Kings River water users and a rejection of 15 years of repeated analysis and rulings by the Department of the Interior on the subject of lump-sum prepayment.

Attorney General Kennedy, however, subsequently approved Solicitor Barry's opinion.

Thus, years of negotiation had produced no final result —except to reveal within the Executive branch of the Government a deep-seated conflict concerning the issues of federal reclamation law which the Ninth Circuit decided in the case below.*

The existence and the nature of that conflict as set forth above are, we suggest, more than an adequate reason why this Court should grant this petition. Whatever the position of the United States today, for two decades it has been a house divided against itself.

The Test Case

After the issuance of the Barry opinion, the Government and the Kings River water users determined that the only method to resolve their impasse was to have the matter decided by the federal courts in a test case.

* While no permanent contract was entered into, beginning with the completion of the Pine Flat Dam in 1954 and continuing through 1963, the United States and the water users agreed to annual, interim contracts providing for payment for conservation water storage. The payments agreed upon far exceeded the cost of operation and maintenance of the dam, and the payments in excess of operation and maintenance costs were to be credited to the water users' repayment obligation upon the execution of a permanent contract. In effect, then, a prepayment installment plan was agreed to and, on an interim, annual basis, was carried out over a period of almost ten years. By December, 1961, the date of the Barry opinion, these prepayments amounted to more than $5,320,000; when the permanent contract was signed in 1963, the water users had prepaid almost one-half of their $14,250,000 repayment obligation; such payments now amount to almost $12 million. In this manner and to this degree, the Kings River water users paid to the Government enormous sums of money in reliance upon repeated assurances, based on repeated rulings of law, that a permanent contract would be executed which provided for prepayment but not acreage limitations. It was for this reason that the District Court found that the Government was estopped from asserting that acreage limitations applied to Pine Flat Dam (R.A. 2607-2609, 2611-2612).

Thus, in December of 1963, the United States and 28 water divesting entities on the Kings River entered into a series of contracts, which included the following provisions:

1. The 28 entities paid or agreed to pay the United States $14,250,000 for the "perpetual and exclusive irrigation storage use" of the reservoir, which use was subordinate to the use of the reservoir for flood control.*

2. The United States and the 28 entities entered into an agreement whereby the entities agreed to be bound by a test case litigation.

3. The United States and the Tulare Lake Canal Company entered into the "test case contract" which precipitated this lawsuit. In that contract, the Tulare Lake Canal Company agreed to and did pay the United States the balance due on its total obligation, thus setting the stage for a test of the "prepayment" issue; the company also agreed not to deliver any stored water to any excess lands; however, the parties further agreed that this restriction would be void *ab initio*, if the laws of the United States at the time of the contract did not prohibit the delivery of stored water to such excess lands (D. Ex. I, Tab 18).

After the test case contract was signed, the Tulare Lake Canal Company deliberately delivered stored water to an excess landowner which, in the presence of government witnesses, was used on more than 160 acres of land. On December 30, 1963, seven days after the test case contract

* The District Court found that payment of $14,250,000 "will fully reimburse to the United States the capital costs of the project allocated in accordance with law to irrigation storage use." (R.A. 2593).

was signed, the United States filed this action against the company seeking an injunction (R.A. 10):*

> "Permanently restraining and enjoining the defendant Tulare Lake Canal Company, its officers, agents, servants, employees and all persons in active concert or participation with them, from delivering stored water released to it from Pine Flat Dam and Reservoir to any lands in excess of 160 acres in one ownership unless under conditions permitted by the provisions of the annexed contract and the applicable laws of the United States."

The Trial

The case was tried from May 4 to May 14, 1971 in the United States District Court for the Eastern District of California. On its direct case, the United States introduced into evidence the relevant contracts and statutes and certain supplementary material. On defendants' case, testimony and other evidence was adduced which, among other things, established the following:

The geography of the Kings River service area is dominated by two natural phenomena.

* In precise terms, the Tulare Lake Canal Company is a California mutual water company which delivers to its shareholders, through canals and works owned by it, Kings River water appropriated under vested, nonappurtenant water rights for use in irrigation. The company is one of the 28 entities which have contracted with the United States for the exclusive and perpetual storage use of Pine Flat Dam for irrigation purposes, such contracts in the aggregate exhausting the entire capacity of Pine Flat Dam for the storage of water for irrigation purposes. The Tulare Lake Basin Water Storage District, an intervenor-defendant below, is another of the 28 contracting entities. Salyer Land Company, an intervenor-defendant below, owns land in the Kings River service area in excess of 160 acres.

First, the area is subject to periodic flooding of severe proportions. Floods occur both in the winter, as a result of intense rainfall, and in the late spring, as a result of melting snow. These floods are so severe that they have continued even after the completion of the Pine Flat Dam in 1954. Extensive flooding occurred in 1955, 1956 and 1958. Even more severe floods took place in 1966-67 and again in 1969-71, causing damages to crops alone of more than $12.5 million* (Tr. 108-09, 114-16, 135, 567, 595).**

The second natural phenomenon is the Tulare Lake Basin, into which the Kings River flows. This basin is the sump of a drainage area; its bed is impervious to seepage, and it is practically level. Accordingly, when the Basin is flooded, as it has been on numerous occasions, even after construction of the Pine Flat Dam, the only processes by which the flood waters recede are natural evaporation or physical removal of the flood waters—processes which can take and have taken two to three years during which the land cannot be farmed (Tr. 564-66).

In 1850, the Basin was owned by the federal government. It was then a fetid swamp, which overflowed periodically and whose water level otherwise was subject only to the process of evaporation. In that year, Congress passed an act which granted to the states certain swamp and overflow lands, including the Tulare Lake Basin to the State of California.† California in turn enacted a number of statutes

* Had Pine Flat Dam not been built, the loss of property from the great flood of 1969 would have run into the hundreds of millions of dollars. The entire cost of construction of the dam was justified many times over in 1969 alone.

** "Tr." refers to pages in the trial transcript.

† The special situation of the swamp and overflowed lands of the Tulare Lake Basin under the Act of September 26, 1850 is treated at length in the petition of Salyer Land Company this day filed.

between 1855 and 1893 which made this land available to private settlement. Title to the land subsequently was acquired by individuals in accordance with these statutes (Tr. 763-65).

Beginning at the end of the nineteenth century, the owners of land along the Kings River expended great effort and vast amounts of money to establish a system of controlled irrigation, to lessen the hazard of periodic flooding and to reclaim the Basin swampland. By 1900, 360,000 acres were under irrigation and reclamation had begun in the Tulare Lake Basin itself. In 1920, 820,000 acres were being irrigated. In 1927, the Kings River Water Association was formed, and the local water users agreed among themselves as to their respective rights to the water flowing from the River. By 1950—before the Pine Flat Dam was completed—950,000 of the area's 1.1 million acres were under private irrigation. The total cost of this effort was more than $70 million, all of it borne by local farmers—not one penny of it borne by either the federal government or the State of California (Tr. 110-13).

In short, the farmers of the Kings River service area, at enormous cost to themselves, and to no one else, had transformed that area, and the Tulare Lake Basin in particular, into one of the most highly productive agricultural communities in the United States (Tr. 123-24 and Int. Ex. IQ).*

Despite these great efforts, flooding continued to be a serious hazard to life and to property. During the bad flood years of 1938-41, the local populace turned to the federal government for help (P. Ex. 4).

* "Int. Ex." refers to exhibits introduced in the District Court by the intervenor-defendants.

The trial also established the many reasons which prompted Congress in 1944 to reach the decision that the Pine Flat Dam was to be deemed a flood control project and to be constructed by the Army Corps of Engineers. As the District Court wrote (App., Ex. C, pp. 95A-96A):

> "1. Studies showed flood control benefits to be greater than irrigation benefits.
>
> "2. The Government claims no water rights in the Kings River.
>
> "3. All the water rights to the Kings River are vested in the water users.
>
> "4. The dam would not create supplemental water which could be sold by the Government.
>
> "5. Arid land would not be reclaimed by reason of the dam being built.
>
> "6. All the canals and ditches carrying water from the Kings River to the farms are owned by the water users.
>
> "7. 200,000 acres known as the Tulare Lake Basin are subject to flood and drought, and are not adaptable to actual settlement as contemplated by the reclamation laws."

Indeed, as the trial established, the only irrigation benefit to be derived from the dam resulted from the more regular flow of water, a result which could be derived from virtually any flood control project.

Finally, the trial established this singular fact: substantial portions of the Kings River service area—indeed, the bulk of the area which today is owned in landholdings in excess of 160 acres—could not be farmed in tracts of 160

acres or less. If any effort were made to farm those lands in tracts of those sizes, the result would be economic disaster (Tr. 122-26, 130, 183, 602-03).

For example, in the southern portion of the Kings River service area, farmers have tried to farm on small tracts, but have never been successful. The soil conditions there are suitable only for field crops, which are not conducive to small-scale farming. A farmer must be prepared for both flood and drought, both in terms of equipment and the ability to bear the loss of a crop, of a season, or even of several consecutive seasons when farming will be impossible because of continued flood conditions (see p. 23, *supra*)* (Tr. 595-97).

There is no potable ground water in the area, and development of a domestic water system is exceedingly expensive. Finally, the capital investment required to farm 320 acres, including payment for land, small equipment, water rights, and private water distribution facilities, was estimated at trial to be (in 1971 dollars) $300,000 (Tr. 598-601).

These factors have dictated a pattern of large-scale farming in the southern half of the Kings River service area** (Tr. 122-23, 143-45).

* One man who attempted to farm in the Tulare Lake Basin on a small scale recounted at trial how he and his parents decided during one of the flood periods to give up: "It was the kind of experience where you had water on both sides of you and they decided to move out and I don't blame them" (Tr. 651). Another small farmer was asked at trial what would have happened had he stayed on in the area, and he replied: "I'd be bankrupt today" (Tr. 676).

** The Ninth Circuit noted this fact, pointing out that the bulk of the so-called "excess holdings" in the Kings River service area were in the southern portion of the area and primarily in the Tulare Lake Basin (App., Ex. A, p. 2A).

The District Court made extensive findings of fact on all the matters we have heretofore discussed (R.A. 2588-2600).

The importance of these findings, which were not disturbed on appeal, is that they illustrate a proposition we urged earlier: the Ninth Circuit's decision will cause economic devastation in a substantial portion of the Kings River service area. The land cannot be farmed in small 160 acre tracts; it cannot become, as the Government suggested at the beginning of the trial, the new home for the "people in the ghettos and inner-cities of the United States" (Tr. 34).

The District Court found (and, as we noted, its finding was not disturbed on appeal) (R.A. 2610):

> "It is infeasible and would produce bizarre and absurd consequences if an attempt were made to impose acreage limitations and family-farm settlements within the Tulare Lake Basin."

If such an attempt were made, large amounts of land would simply go out of cultivation (Tr. 602).*

* The Bureau of Reclamation's own studies agree that small-scale farming just will not work in those portions of the Kings River service area which are now held in excess of 160 acres and would be disastrous to the small farmers who tried and to the general agricultural economy of this highly productive area. In September, 1941, for example, the Commissioner of the Bureau of Reclamation advised the Secretary of the Interior as follows (D. Ex. L11): "The Reclamation Law limits the individual holdings on a project to 160 acres. This limitation is probably unwise for all parts of the Kings River area. For example, subdivisions and settlement of the Tulare Lake bed would be hazardous . . ." The Bureau's studies subsequent to the authorization of the dam were even more pointed. In April, 1947, a study of the Basin area concluded that,

(footnote continued on next page)

In these circumstances, whatever else the consequences of the Ninth Circuit's decision may be, one consequence will *not* be to open large tracts of privately owned land for settlement by persons of modest means.

Reasons for Granting the Writ

The court below has decided important questions of federal law which have not been but should be settled by this Court.

A. Section 46 of the 1926 Act—the "Prepayment" Issue

The decisions below—the District Court's decision and the Ninth Circuit's reversal—are the only judicial determinations that have been made of the "prepayment" issue.

The Ninth Circuit frankly recognized the broad scope of its decision. It wrote (App., Ex. A, p. 43A):

> "We consider next whether, by repaying construction charges, owners of excess lands may avoid the obligation under section 46 to execute recordable contracts with the Secretary of the Interior providing for the sale of their excess lands at ex-project prices. This is the more far-reaching of the two grounds for the

even "assuming a dry year," "a 160-acre farm unit is too small to provide an adequate farm family living over and above operating costs" (D. Ex. N). And in September, 1947, the Regional Supervisor in Sacramento concluded that no distinction could be made between the Basin area and the balance of the Kings River area in terms of the impracticality of the 160-acre limitation (D. Exs. Q and R). (Because the Bureau's position at that time was that the Pine Flat Dam was subject to the acreage limitations pursuant to the Flood Control Act of 1944, the September, 1947 study recommended that the Department of the Interior introduce in Congress legislation exempting the dam from the acreage limitations.)

> district court's decision *since it affects all federal reclamation projects subject to section 46 of the 1926 Act,* not just those authorized in the Flood Control Act of 1944." (Emphasis added)

And in a footnote, the court below said (App., Ex. A, p. 43A):

> "Section 46 of the 1926 Act is, with few exceptions, applicable to all projects built after 1926. These projects contain the vast majority of lands receiving water from federal reclamation projects. In 1924 only about 1,300,000 acres were under irrigation in federal reclamation projects. Federal Reclamation by Irrigation, S. Doc. No. 92, 68th Cong., 1st Sess. 60 (1924). By 1970 almost 8,570,000 acres were receiving either full or supplemental water service from federal projects, and 10,198,000 irrigable acres were available for service. Hogan, *supra* note 81, at 1. Private lands included in the 7 million acres brought under irrigation since 1924 are covered by §46 of the 1926 Act unless the particular project is expressly exempted. Private lands have always predominated in federal reclamation projects, especially in more recent projects. *See, e.g.,* Acreage Limitation Policy, *supra* note 9, at 82-83."

We have already noted the fundamental impact that the Ninth Circuit's decision will have on the agricultural economy of reclamation projects covered by §46 of the 1926 Act by mandating the elimination of large-scale farms in individual ownership (see p. 6, *supra*).

And we have already noted the sharp conflict between the Ninth Circuit's decision and the long-established administrative rulings and practices of the Department of the Interior which were not repudiated until 1961 (see pp. 15-20, *supra*).

The Ninth Circuit, to be sure, took issue with our contentions concerning those long-established rulings and practices, suggesting that except for a brief period in the 1950's, those rulings and practices on prepayment did not prevail. This is not the occasion to debate that issue at extended length, but is the occasion, we submit, for this Court to recognize the importance of the result reached below and the need for full review by this Court.

The Ninth Circuit, we suggest, recognized the significance of the conflict between its decision and prior administrative rulings and practices by the lengths to which it went to explain away the 1947 opinion of Associate Solicitor Felix Cohen. After an analysis of the reasoning behind the Cohen opinion, the court below wrote (App., Ex. A, p. 81A):

> "The surprising superficiality of the Cohen opinion may be explained by the political context in which it was issued. It appears to have been a hastily contrived means to achieve an end thought to be of overriding importance to the Department. *For whatever reasons, the Bureau of Reclamation had not moved as decisively or uniformly as it might have to enforce acreage limitations. A survey of reclamation projects completed in 1946 and a conference of key Bureau personnel in early 1947 revealed substantial noncompliance with the acreage limitations on many projects.* Senator Downey of California and others were marshaling support for a renewed attempt to entirely exempt projects in California, Colorado, and Texas from acreage limitations. Department and Bureau officials wished to present a record of enforcement to Congress as part of an overall defense of acreage limitation pro-

> visions. It was considered impracticable at that late date to secure the individual recordable contracts the Bureau had failed to require as a precondition to delivering project water when projects were first opened. The Cohen opinion was prepared as a part of a program to meet this problem. *It was transmitted to field offices to provide a means for achieving rapid 'compliance' with acreage limitations which could then be reported to Congress, albeit 'compliance' by avoidance through payment of construction charges."* (Emphases added)

This passage from the opinion below suggests additional compelling reasons why this Court should grant the petition. If beginning in 1947, the Department of the Interior used "prepayment" as a means for remedying what until then had been "substantial non-compliance" with acreage limitations on federal reclamation projects, the decision below has cast grave doubts on what is *now* to be done in all those situations where "prepayment" was used.

Under the Ninth Circuit's decision, any "prepayment" contracts entered into by the Department of the Interior with landowners which did not include acreage limitations were surely unauthorized and illegal and may very well be void. All of the rights of excess landholders under those contracts have now become unsettled.

Moreover, to the extent, if any, that the rights of such excess landowners are not disturbed—if other landholders have been able to lift acreage limitations by "prepayment" but the farmers of the Kings River service area are now to be denied that right—then the Ninth Circuit's decision poses problems of discrimination and forfeiture of constitutional dimension.

In other respects, the Ninth Circuit's decision raises questions of constitutional dimension which should be determined by this Court. The Ninth Circuit took the view that one of the basic goals of federal reclamation law was a species of "land reform"—to create family-sized farms in areas irrigated by federal projects. The court below went even further. It wrote (App., Ex. A, p. 49A):

> "Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale."

But whatever the congressional power to achieve such results on public lands by acreage limitations, or to achieve such results on private lands by conditioning the federal subsidy of a reclamation project on compliance with acreage limitations, a totally different problem emerges as to private land and privately owned water rights where the landowners have prepaid the United States in full for the "perpetual and exclusive irrigation storage use" of a flood control reservoir subordinate only to the use of the reservoir for flood control, thereby forsaking any federal subsidy.

To put it another way, when *private* landowners have repaid the federal government in full for the costs of a reclamation project or for the allocable costs of the irrigation benefits of a flood control project, by what constitutional mandate may Congress still insist on "land reform" or the "redistribution of large privately owned tracts" of land by means of the continued imposition of acreage limitations on those private landowners? Under the Constitution, Congress may have the power to impose reasonable

conditions on citizens who are the beneficiaries of the expenditure of Government funds, but we respectfully submit that under the Constitution, Congress does not have the power to decree the confiscation of private property—the redistribution of land "at prices substantially below the actual value of such lands at the time of sale"—after the private landowners have fully discharged their specific monetary obligations to the Government for the cost of constructing a federal reclamation project. This issue assumes even greater significance when the project involved is not even a reclamation project—but a flood control project concerned with privately owned water as to which the Government has no interest.

In a case where the intent of Congress surely could not have been what the Ninth Circuit divined it to be and where various officials of the Executive branch have offered conflicting opinions as to what Congress intended, the Ninth Circuit's decision on the "prepayment" issue surely is worthy of review by this Court.

B. Section 8 of the 1944 Act

The Ninth Circuit's interpretation of §8 of the 1944 Act may not have the same vast implications as its decision on the "prepayment" issue, but it nonetheless affects 90 projects authorized by the 1944 Act, including the Pine Flat Dam project which by itself involves a service area of 1.1 million acres.*

The Ninth Circuit's decision will have the same impact on these 90 flood control projects which were authorized

* Since §8 appears to be a statutory provision of general applicability, it may well apply to each and every flood control project authorized by the Congress anywhere in the United States since the enactment of the 1944 Act.

throughout the United States as it will have on all reclamation projects subject to §46 of the 1926 Act—it will mandate the elimination of large-scale farms in individual ownership. In the case of the Kings River service area, it will destroy the settled economy of an important agricultural community (see pp. 25-28, *supra*).

In the case of the Kings River service area, this destruction will take place, despite the fact that all of the irrigation works and canals in that area were privately constructed and privately paid for and despite the highly significant fact that the Government has *no* water rights of any kind in the Kings River, all of the water having been privately appropriated long before the Pine Flat Dam was authorized and constructed.

And all of these results will flow, we submit, from the Ninth Circuit's misreading of the legislative history of the Flood Control Act of 1944 and its misunderstanding of the nature of the "compromise" between the Roosevelt Administration and Congress reflected in §§8 and 10 of the 1944 Act.

In the final analysis, the Ninth Circuit's decision is based on its misconstruction of a portion of the third sentence of §8 of the 1944 Act. That sentence, in pertinent part, reads:

> "Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section. . . ."

The Ninth Circuit would have that sentence read (App., Ex. A, p. 39A):

> "*All* dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with *federal reclamation law*. . . ."

To achieve this feat of statutory construction,* the Ninth Circuit engaged in a lengthy analysis of legislative history, but we respectfully submit it misread the history it relied on and it ignored a great deal of history which would have demonstrated the error in its interpretation of §8.**

---

* This may well be a case, as Mr. Justice Frankfurter once pointed out,

> "for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956).

** Respect for this Court's time precludes a review of the legislative history which the Court of Appeals ignored or mischaracterized. Illustrative of this history are the remarks of the Chairman of the House Flood Control Committee, Congressman Whittington during debate on the Flood Control Act of 1944 (90 Cong. Rec. 4123-4124 and 4209):

> "The testimony discloses that the Bureau is anxious to be authorized to construct the works along [the Kings River]. Fundamentally the Bureau of Reclamation is concerned with the development of public lands. Along Kings and Kern Rivers there is no public lands. There are no Federal reclamation projects. The people in these valleys have constructed and operated their own reclamation projects and they oppose the supervision of their projects by the Bureau of Reclamation or by any other Federal agency. I commend the people of the valley for providing for their own needs to cultivate their lands rather than coming to Congress to do for them what they can better do for themselves. The committee held repeated hearings. With one accord, the citizens of both valleys advocated the project as recommended by the Chief of Engineers in preference to the project as recommended by the Bureau of Reclamation. The committee felt that flood control was dominant. . . .
>
> * * *
>
> "There are items in this bill for the protection of the magnificent valleys of the Kings and Kern Rivers, where the people for more than 75 years have constructed their own local protective works, where millions of dollars have been invested in local protection works."

In particular, the Ninth Circuit ignored all of the legislative history which demonstrated that Congress' principal concern was not to make all of federal reclamation law, including acreage limitations, applicable to all of the 90 flood control dams it was authorizing in the 1944 Act.

The compromise that the Roosevelt Administration achieved was that: (a) if the Secretary of War should determine upon the recommendation of the Secretary of Interior that a flood control project could be used for irrigation purposes by the construction of additional works* (which means that there is potentially a water supply available for appropriation by the United States which it can develop and offer for sale to potential water users), after such a determination by the Secretary of War, the Secretary of Interior may then make an appropriate report and findings to Congress** and seek congressional authority to construct additional works and develop a reclamation project, which, in essence, would constitute the *sale* of water by the United States; if the Congress should authorize such a project, then the whole panoply of federal reclamation law,

* In the Kings River service area, no new additional works were necessary. They were already there, privately built and paid for by the farmers, before the Pine Flat Dam was constructed; nor were any additional works constructed.

** Among other things, the Secretary had to comply with 43 U.S.C. §412, which provides:

> "After December 5, 1924, no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

The Secretary of the Interior has never performed any of these statutory tasks with respect to the Pine Flat Dam project.

including acreage limitations, comes into play; (b) on the other hand, insofar as the Pine Flat Dam project is concerned, Congress recognized that the ability to regulate the flow of the river by the storage of water behind the Pine Flat Dam could be of considerable benefit to the water users and that, if they availed themselves of the privilege of storing water behind the dam, they had to pay the United States for that privilege.

As to (a) above, Congress achieved that result in §8 of the 1944 Act; as to (b) above, Congress achieved that result as to the Pine Flat Dam in §10 of the 1944 Act in statutory language to which we have previously referred (see pp. 13-14, *supra*).

The preceding paragraph, we think, is the accurate description of the extent to which Congress acceded to the Roosevelt Administration's pleas that the interests of "reclamation" be protected with respect to the flood control projects Congress was authorizing in the 1944 Act.

The Ninth Circuit failed to recognize that this was the extent of the "compromise" the Roosevelt Administration had been able to achieve. But President Roosevelt did recognize that fact: after passage of the 1944 Act, Secretary Ickes submitted a lengthy proposed statement for the President to read on signing the Flood Control Act purporting to confirm that the Kings River project was subject to federal reclamation law and acreage limitations "regardless of whether additional irrigation distribution works are involved" (P. Ex. 135). This claim of victory was not accepted by President Roosevelt; instead he issued a statement containing no reference to §8 or to the Kings River project.

And on April 2, 1945, in signing into law authorization for an appropriation of funds for the Kings River project, the President stated (D. Ex. X12):

> "I have approved reluctantly H. R. 2126, the War Department civil functions appropriation bill, fiscal year 1946.
>
> "Notwithstanding the fact that the bill contains appropriations for certain worth-while purposes, I have been reluctant to sign it because of the fact that it contains also appropriations for work by the Corps of Engineers in connection with projects in the Central Valley area of California, such as the projects in the Kings and Kern Rivers and tributaries.
>
> "On a number of occasions, I have expressed the opinion that these projects, which are predominantly irrigation projects should be constructed and administered under the Federal reclamation laws. The provision of funds now for plans for their construction by the Corps of Engineers may affect adversely existing Federal reclamation work in the Central Valley area and has a tendency, in my judgment, to undermine the established policy which seeks, through Federal reclamation projects, to create farm homes while providing, to the fullest practicable extent, for reimbursement of costs. . . .
>
> "I propose in the near future to submit to the Congress recommendations for legislation transferring jurisdiction over all of these projects in the Central Valley of Calilfornia to the Bureau of Reclamation, Department of the Interior."

Based on the foregoing, we respectfully submit that this Court should review the Ninth Circuit's decision to determine whether it has accurately comprehended the meaning of §8 of the Flood Control Act of 1944 and correctly understood the basic purposes behind Congress' enactment of that provision as part of an omnibus bill authorizing some 90 flood control projects throughout the United States. Clearly, this is an important question of federal law which has not been, but should be settled by this Court.

If for no other reason, this Court should grant review to prevent the economic devastation of an important agricultural community in the United States.

Conclusion

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10022
Attorney for Petitioners

Of Counsel:

ALLAN BLUMSTEIN
MARVIN WEXLER
New York, New York

ALVIN J. ROCKWELL
THOMAS A. WELCH
BROBECK, PHLEGER & HARRISON
San Francisco, California

DONNELLY, CLARK, CHASE & JOHNSON
NEWELL & CHESTER
Los Angeles, California